(3)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONERS' REPLY BRIEF

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1. Middlesex Does Not Resolve The Issue Presented.

In *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court did not decide whether notice was a jurisdictional or procedural requirement for environmental citizen suits, nor did this Court discuss the

purpose of the notice requirement. Instead, this Court focused its attention and expressly limited its review to three issues:

> (i) whether the FWPCA [Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*] and MPRSA [Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.*] imply a private right of action independent of their citizen-suit provisions, (ii) whether all federal common-law nuisance actions are pre-empted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance.

Id. at 10-11.

This Court said the implied right of action question was one of determining Congress' intent. To do that, this Court outlined the "unusually elaborate enforcement provisions" of FWPCA and MPRSA and mentioned that the citizen suit provisions require compliance "with *specified procedures*—which respondents here ignored—including in most cases 60 days' prior notice to potential defendants." *Id.* at 14 (emphasis added). This Court then concluded:

> In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA.

Id.

As can be seen from the context, this Court did not consider or decide whether the 60-day notice provision was a jurisdictional or procedural requirement. The language this Court chose is itself inconclusive on the question presented here. Indeed, the use of the words "specified procedures" suggests that notice is a procedural, rather than a jurisdictional, requirement.

Furthermore, although this Court sought to discover whether Congress intended to imply a private right of action by studying the statutory scheme, no attempt was made, because none was required, to discover whether Congress intended notice to be a procedural or a jurisdictional prerequisite.

Also, the sentence in *Middlesex* that respondent interprets is dictum, and this Court does not decide important issues based on dicta. In *Permian Basin Area Rate Cases,* 390 U.S. 747 (1970), this Court rejected an argument based on dictum:

> The dictum is imprecise, but even if it were not, we could not agree that it can now be controlling. The construction of the Natural Gas Law was not even obliquely at issue in *Bowles,* and *this Court does not decide important questions of law by cursory dicta in unrelated cases.*

Id. at 775 (emphasis added).

Finally, it is worth noting that the Ninth Circuit did not discuss or rely on *Middlesex* when it concluded that the notice requirement is jurisdictional. It is also worth noting that in *Middlesex,* none of the defendants, including the EPA and the State Departments of Environmental Quality, received any notice. Here, although the EPA and the State did not receive prior notice, they were not parties.

2. Respondent's Argument That There Is No Conflict After Middlesex Is Wrong.

This Court should reject respondent's invitation to ignore the truth and pretend the 4-4 split among the Circuits does not exist. As respondent concedes, if cases decided before *Middlesex* are not ignored, there is a direct conflict among the Circuits that have decided the issue presented. As noted above, *Middlesex* is inconclusive, so the decisions of the Second, Third, and District of Columbia Circuits cannot be simply ignored. *Natural Resources Defense Council v. Callaway,* 524 F.2d 79 (2d Cir. 1975) (procedural interpretation); *Susquehanna Valley Alliance v. Three Mile Island,* 619 F.2d 231 (3d Cir. 1980) (procedural interpretation); and *Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C. Cir. 1974) (procedural interpretation).

Even if only cases decided after *Middlesex* are considered, there is still a conflict. In *Hempstead Cty. & Nevada Cty. Project v. U.S.E.A.,* 700 F.2d 459 (8th Cir. 1983), the Eighth Circuit held that the notice requirement was procedural while the First Circuit in *Garcia v. Cecos Int'l, Inc.,* 761 F.2d 76 (1st Cir. 1985) and the Sixth Circuit in *Walls v. Waste Resource Corp.,* 761 F.2d 311 (6th Cir. 1985) decided that the notice requirement was jurisdictional.

Respondent's attempt to distinguish *Hempstead* fails. In that case, the circuit court decided it was best to transfer the RCRA case to the district court if the district court would have had subject matter jurisdiction when the action was filed. Thus, it was necessary to consider whether the failure to give the 60-day notice to the EPA precluded the district court's subject matter jurisdiction. In holding that the purpose of the notice provision had long been satisfied, the court held that the notice requirement was not jurisdictional. If the notice requirement had been jurisdictional, then the district court would not have had subject matter jurisdiction, and the court would have had no alternative but to dismiss the case.

Although, as respondent noted, the EPA said it would not raise any "issue regarding the technicalities of the notice provision" in the district court, it is well established that the parties cannot confer subject matter jurisdiction by agreement. Thus, the question whether the notice requirement is a jurisdictional prerequisite was squarely presented. Therefore, respondent's argument that there is no conflict after *Middlesex* is wrong.

3. Respondent's Discussion Of Gwaltney Is Erroneous.

This Court wrote in *Gwaltney of Smithfield v. Chesapeake Bay Found.,* — U.S. —, 108 S.Ct. 376, 382 (1987), that the 60-day period gives the EPA and the State time to file their own enforcement actions in either federal or state court, and that the notice provision also gives the violator time to come into complete compliance. This Court expressly said that the purpose of the notice to the alleged violator was to give it time to bring itself into complete compliance, thereby rendering unnecessary a citizen's suit. Although this Court did not specifically begin a sentence with the words "The purpose of the notice provision to the EPA and the State . . .," the import of this Court's discussion of the notice provision to the EPA and the State is clear enough. The purpose of the notice

provision is to give the EPA and the state time to file their own enforcement actions, thus rendering unnecessary a citizen's suit.

If the only kind of action by the EPA or the state that can stop a citizen's suit is a civil enforcement proceeding filed *in court,* then the Ninth Circuit's concern (and that of *Garcia* and *Walls*), that a pragmatic interpretation of the notice provision would not encourage nonjudicial resolution, is not relevant. If the Ninth Circuit's primary reason for interpreting the notice provision as jurisdictional is not one supported by this Court's analysis of the purpose of the notice provision, then the Ninth Circuit's decision should be reversed.

4. When The Circuits Conflict On How To Interpret A Statute, And One Interpretation Accomplishes The Intent Of Congress, And The Other Interpretation Defeats The Intent Of Congress, This Court Should Interpret The Statute To Accomplish The Intent Of Congress.

As respondent noted, "the *starting point* for interpreting a statute is the language of the statute itself." *Gwaltney, supra,* 108 S.Ct. at 381 (emphasis added). The reason why the language of the statute itself is the starting point, and not the end point, is because the intent of Congress is not always accurately reflected in the words it has chosen. As noted previously, the purpose of the statutory interpretation is to determine how Congress intended its statute to apply to the case at hand. *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 577 (1982) (Stevens, J., dissenting).

It is inconceivable that Congress intended the result in this case. The purpose of the notice provision is to

give time to act. If no action is taken, then the citizens should proceed to protect the environment. After all, it is the environment that Congress thought to protect, and the right of citizens to sue is not one intended to protect citizen rights, but the purity of the environment. As Senator Hart observed concerning citizen suits to enforce the Clean Air Act, 42 U.S.C. § 7604:

> First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. *It will be the rare, rather than the ordinary person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.*

116 Cong.Rec. 33104 (1970) (emphasis added).

Respondent concludes that there is nothing remarkable about the result in this case. Petitioners disagree. This case has involved four years of litigation, four days of trial, a finding of an RCRA violation, and the citizen plaintiffs have spent $95,000 to obtain protection for the environment.

Petitioners at least partly complied with the letter of the notice provision when they gave notice to respondent. Despite this notice, respondent continued to pollute the environment and still does so. Congress surely did not intend that a citizen's failure to give notice is worse than polluting the environment.

The interpretation that respondent advocates protects the polluter at the expense of the environment and the private attorney general. This is not what Congress

intended, and this is why this Court has the power to go beyond the letter of the statute to give effect to what Congress intended. *Holy Trinity Church v. United States,* 143 U.S. 457, 459 (1892) (court will consider whole legislation to avoid absurd results and to accomplish intention of legislature).

Respectfully submitted,

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